(21)

No. 93-714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

U.S. BANCORP MORTGAGE COMPANY,

Petitioner,

v.

BONNER MALL PARTNERSHIP,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm that represents victims of the abuse of power in our society. TLPJ selects its cases from among those that will advance the cause of justice, educate the public, modify corporate or government behavior, or improve the access of victims to the courts to remedy injustice. Supported by over 1400 lawyers in the United States and around the world, TLPJ is dedicated to using civil remedies to advance the public good.

We believe that the practice of routinely vacating as moot cases that are voluntarily settled by the parties poses a grave threat to our civil justice system. Routine vacatur is both destructive of the public values inherent in a final judgment and inefficient, in that it encourages litigants to delay settlement until after trial and judgment. In this brief, we advocate the rejection of a rule requiring courts to defer to requests of settling parties for vacatur and the adoption of a rule requiring courts to deny post-settlement motions for vacatur unless there is a demonstration that the judgment is infirm or that retention of the judgment is otherwise unfair for reasons not of the parties' making.

SUMMARY OF ARGUMENT

One of the primary policy arguments advanced by advocates of routine vacatur -- including petitioner in this case -- is that vacatur does not negate the public value of judicial decisions and, at the same time, it conserves judicial resources by promoting settlements. In fact, however, routine vacatur

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[1] Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

imposes substantial costs on the public. First, vacatur negates the public benefit of judicial decisions by limiting their precedential and informational value. Second, vacatur squanders judicial resources by destroying the preclusive effects of judgments and reducing incentives to early settlement. Finally, vacatur allows manipulation of the judicial process by permitting repeat litigants to control the development of the law by buying and selling judicial decisions.

In light of these costs, this Court should announce a rule restricting vacatur to circumstances in which the judgment is defective or where a litigant has been precluded from obtaining appellate review of the judgment due to circumstances beyond its control. It is only through such a rule, in which settlement of a case does not generally entitle the parties to vacatur, that the Court can preserve the public values inherent in the litigation process.

ARGUMENT

ROUTINE VACATUR SHOULD BE REJECTED BECAUSE IT IMPOSES SUBSTANTIAL COSTS ON THE PUBLIC.

Because petitioner's argument that routine vacatur is legally compelled by this Court's decision in *United States v. Munsingwear*, 340 U.S. 36 (1950), is definitively rebutted by respondent in its brief, we do not address that argument here.[2]

[2] We note, however, that *Munsingwear* did not hold that a case must be vacated as moot when it is settled pending appeal, nor did it attempt to set forth standards for when vacatur is appropriate. Indeed, the issue of whether to vacate a lower court decision was not before this Court in *Munsingwear*; rather, the Court was asked to determine the *res judicata* effect of a previous judgment that had *not* been vacated after it became moot. *Id.* at 40.

Instead, this brief focusses on the costs associated with permitting vacatur at the request of a settling party. In light of these costs, which are described below, this Court should reject the request for vacatur in this case and adopt a rule that motions to vacate cases settled pending appeal may be granted *only* in cases where (1) the litigants establish that the previous judgment was defective; or (2) where a litigant is precluded, by "happenstance," from obtaining appellate review.[3]

I. Routine Vacatur Negates the Public Value of Judicial Decisions.

The public benefit of judicial decisions is largely a function of their precedential value. As Justice Stevens recently observed in *Izumi Seimitsu Kogno Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam): "Judicial precedents are presumptively correct and valuable to the legal community as a whole." 114 S. Ct. at 431 (Stevens, J., dissenting from dismissal of *certiorari* as improvidently granted). *See also Memorial Hospital v. United States Department of Health & Human Services*, 862 F.2d 1299, 1302 (7th Cir. 1988). Precedential value is particularly important with respect to decisions rendered by the courts of appeals. Not only do these decisions encompass the added procedural protection of appellate scrutiny, but they have been achieved at the expense of two levels of judicial resources, increasing the public's interest in their preservation.[4]

[3] The first of these circumstances is justified by the language of Fed. R. Civ. P. 60(b), which authorizes courts to grant relief from judgments that resulted from, *inter alia*, mistake or fraud, as well as the inherent power of the courts. The second encompasses the *Munsingwear* doctrine, as elaborated by this Court in *Karcher v. May*, 484 U.S. 72, 83 (1987).

[4] *See Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993) (distinguishing request for vacatur of appellate decision from its

Decisions have a further informational value that extends beyond their strict use as precedent. Many judicial decisions require the resolution of complex issues of law and fact. Litigation has become increasing complicated; many cases involve issues of first impression requiring the interpretation of complex statutes, or the resolution of difficult technical or scientific questions through the assistance of expert testimony.

In addition to clarifying the rights and responsibilities of future litigants, these cases clarify the law for future actors. Thus, for example, a detailed district court decision analyzing the clean-up requirements under an environmental statute provides guidance for companies involved in future pollution clean-up outside of the litigation context. A trial that addresses scientific issues such as the toxic effect of hazardous substances may affect the development of administrative safety standards as well as industrial practices for the handling of these substances. A decision resolving rules of bankruptcy allows creditors and debtors to plan future reorganizations. When these decisions are vacated, the resources committed to developing the law have been lost.[5]

Judgments also confer public benefit by imposing public accountability for wrongdoing. A judicial finding of illegality

prior decisions requiring vacatur of district court decisions and holding that, with respect to appellate decisions, the interest in preserving precedent is paramount).

[5] *See, e.g., Long Island Lighting Co. v. Cuomo*, 888 F.2d 230 (2d Cir. 1989) (vacating 56-page district court opinion interpreting and evaluating the validity of two complex environmental statutes); *Marathon Oil Co. v. Lujan*, 751 F. Supp. 1454 (D. Colo. 1990), *aff'd in part and rev'd in part*, 937 F.2d 498 (10th Cir. 1991) (relitigation of complex issues involving rights to oil shale mining patents under federal mining law after prior district court opinion addressing many of these issues was vacated when the case was settled on appeal.)

often has public significance that extends beyond the parameters of the litigation itself. Vacatur destroys this valuable benefit. For example, vacatur of the district court opinion in *Kitlutsisti v. ARCO Alaska, Inc.*, 792 F. Supp. 832, 835-37 (D. Alaska 1984), *vacated*, 782 F.2d 800 (9th Cir. 1986), erased a district court finding that the Environmental Protection Agency ("EPA") had failed to perform its statutory duty to process applications for drilling permits under the Federal Water Pollution Control Act of 1972. The court found that the EPA had repeatedly "been using 'creative' administrative techniques of dubious legality to avoid [its] clear statutory mandate . . . of issuing NPDES permits." 592 F. Supp. at 838-44. Similarly, the post-settlement vacatur in *Policemen and Firemen Retirement System v. Income Opportunity Realty Trust*, No. C-89-1152 (AJZ) (N.D. Cal. May 16, 1989), erased the court's holding that the defendant's poison pill/purchase rights plan was illegal.[6]

Proponents of vacatur, however, have argued to this Court that vacatur has little effect on the public value of judgments. For example, petitioner in this case claims that vacatur does not negate the benefit of sound decisions. Pet. Br. at 35. Accordingly, it seeks to persuade the Court that there is little cost to vacating a judgment when a case is settled pending appeal.[7] This argument is disingenuous.

[6] A similar state court practice in *Neary v. The Regents of the University of California*, 7 Cal. App. 4th 73, 278 Cal. Rptr. 773 (1991), *rev'd*, 3 Cal. 4th 273, 10 Cal. Rptr. 2d 859 (1992), allowed three veterinarians employed by the University of California to reverse, by stipulation, a jury finding that they had libeled a cattle farmer by falsely accusing him of mismanagement in connection with an investigation by state agricultural officials into the death of his cattle. As in *Kitlutsisti*, vacatur erased the finding that officials acting in a public capacity had acted wrongfully.

[7] Similarly, during the oral argument in *Izumi*, respondent's counsel argued, in support of a rule allowing routine vacatur, that vacatur does not

In reality, vacatur destroys much of the public value of a decision.[8] As this Court's questioning last term in *Izumi* demonstrated, although the analysis in a vacated opinion may be useful, as is the analysis in a law review article, it does not provide the same guidance or value to subsequent courts and the public at large as an actual judgment. Although a vacated opinion may contain interesting reasoning, as does a law review article, a subsequent court is free to reject the reasoning of either one.[9] The resources expended by the parties in the previous litigation have been squandered.

Moreover, vacatur is not independent of other methods of destroying an opinion, such as depublication, withdrawal, and expungement.[10] If a decision is vacated prior to publication in the official reports, it is generally withdrawn from publication with an explanation that leaves subsequent courts without guidance as to either the nature of the opinion or the reasons for

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affect the correctness of a judgment or deprive the vacated opinion of "whatever forceful effect it may have." Counsel then suggested, in response to questions by the Court, that the vacated opinion would continue to bind other courts in that Circuit. Official Transcript of Proceedings before the Court, No. 92-1123 (Oct. 12, 1993) ("*Izumi* Transcript"), at 37-39.

[8] The United States has previously taken the position that vacatur removes all precedential and other legal effect from a decision. *See Izumi* Transcript at 45. *See also* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 615-24 (1991) (analyzing legal effect of vacatur).

[9] *See Izumi* Transcript at 39-40 (questioning by Justice Scalia indicating that, unlike a law review article, an opinion has *stare decisis* effect; requiring subsequent courts to follow the opinion even if they disagree with its reasoning).

[10] *See Izumi* Transcript at 37 (question by Justice Ginsburg indicating that, if vacated opinion is caught in time, it will not be published in the official reporters).

withdrawal.[11] Thus, vacatur does not merely destroy the binding effect of an opinion; it can eradicate its informational value, as well.

II. Routine Vacatur Squanders Judicial Resources.

Routine vacatur wastes judicial resources in two ways: by destroying the preclusive effect of judgments; and by reducing the incentives to early settlement. Regarding the former, a final judgment can be used to bar future litigation under the doctrines of *res judicata* and collateral estoppel. This Court has explained the value of these doctrines in conserving judicial resources, preventing multiplicitous litigation, and minimizing the possibility of inconsistent decisions. *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Preclusion thus serves to conserve the resources consumed by litigation and to preserve

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[11] *See* Fisch, *Rewriting History*, *supra*, 76 Cornell L. Rev. at 620 n.163 (describing general practice in which vacated opinions are withdrawn from the on-line reporting services (LEXIS and WESTLAW), as well as the bound editions of the federal reporter, leaving no indication of the substance of the opinion and little explanation even of the reasons for withdrawal). The information provided to subsequent courts is illustrated by the entry in the official reporter at 724 F. Supp. 209:

> EDITOR'S NOTE: The opinion of the United States District Court, S.D.N.Y., *Mason Tenders Council Welfare Fund v. Akaty Construction Corp.*, published in the advance sheet at this citation, 724 F. Supp. 209-24, was withdrawn from the bound volume because the opinion was vacated and withdrawn by order of the Court.

As this example illustrates, unless a researcher had examined (and preserved) the West advance sheets, she would be unlikely to discover that this case involved the relitigation of an issue that had been decided in an earlier lawsuit involving the same plaintiff. The prior lawsuit had also been vacated. *Mason Tenders District Counsel Welfare Fund v. Dalton*, 648 F. Supp. 1309, *vacated upon request of the parties*, 648 F. Supp. 1318 (S.D.N.Y. 1986).

the public interest in the final resolution of issues, as well as disputes.[12]

Litigants seek vacatur precisely for the purpose of destroying the preclusive effects of a judgment and gaining a second bite at the apple. *See, e.g., Izumi*, 114 S. Ct. 425; Fisch, *Rewriting History, supra*, 76 Cornell L. Rev. at 615-24 (describing preclusive effect of judgment in *National Union Fire Insurance Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989), in subsequent litigation). Granting such motions wastes judicial resources because it prevents subsequent litigants from resolving previously litigated issues expeditiously without the need for a second trial.

Routine vacatur also wastes resources by reducing the incentives to early settlement. Ironically, proponents of vacatur routinely argue that the judicial practice of vacating a judgment when the case is settled on appeal encourages parties to settle their dispute rather than continuing the appellate process. In reality, the systematic practice of granting motions to vacate when a case is settled on appeal allows parties to delay settlement until after trial.[13] This concern is of increased importance as the federal courts struggle with crowded dockets, and cases sometimes wait years for the availability of a judge.

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[12] Preservation of these values is consistent with this Court's recent decision in *Cardinal Chemical Co. v. Morton Intern. Inc.*, 113 S. Ct. 1967 (1993) (overturning practice by Federal Circuit of routinely vacating as moot cases involving declaratory judgment of patent validity upon a finding of noninfringement).

[13] *See, e.g.*, Fisch, *Rewriting History, supra*, 76 Cornell L. Rev. at 632-38 (demonstrating through economic analysis that availability of post-settlement vacatur discourages early settlement); Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loyola (LA) L. Rev. 103 (1993) (empirical evidence in California appellate system suggests that rate of settlement is actually higher where routine vacatur is not available).

Vacatur allows litigants to delay settlement because it removes one of the incentives to settle a case early on -- the possible preclusive or collateral consequences of an adverse judgment. It is axiomatic that early settlement reduces both the public and private costs of litigation. However, if a losing party can erase an adverse judgment and its consequences through settlement on appeal and vacatur, the litigant will have less incentive to settle before trial. Instead, the party can roll the dice by going to trial, secure in the knowledge that an adverse decision can later be removed. The availability of vacatur thus reduces the risk of going to trial and encourages the litigants to squander the substantial public resources consumed by a trial.

This factor is particularly compelling in the case at bar, in which the parties have proceeded through bankruptcy court, district court, and the court of appeals, as well as petitioning for *certiorari* in this Court. The consumption of public resources by this case has been substantial, and those resources should not, at this point, simply be converted into a "bargaining chip in the settlement process." *Memorial Hospital*, 862 F.2d at 1302.

III. Routine Vacatur Allows Manipulation of the Judicial System.

By allowing the parties to erase a judgment upon request, the courts do more than simply squander public resources; they create a process in which judicial decisions, and ultimately the development of the law, become commodities that can be bought and sold. Over time, routine vacatur actually distorts the development of the law in a particular direction by allowing repeat litigants to eradicate adverse decisions.

As the United States acknowledges in its brief, litigants who

are repeat players are vitally interested in vacatur because it affects their rights in subsequent litigation. U.S. Br. at 1. For many such litigants, the cost of settling a particular litigation is minimal compared to the costs of living with an adverse precedent. Vacatur allows removal of the precedent and a chance to "clear[ ] the path for future relitigation of the issues . . .." *Munsingwear*, 340 U.S. at 40. As this Court has noted, such relitigation "reflects either the aura of the gaming table or a 'lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.'" *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) (quoting *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952)).

The relitigation made possible by routine vacatur not only wastes judicial resources and compromises the public interest in the finality of judgments (*supra* at I and II), but it also distorts the development of the law by allowing "a party with a deep pocket to eliminate an unreviewable precedent it dislikes simply by agreeing to a sufficiently lucrative settlement . . .." *Manufacturers Hanover*, 11 F.3d at 384. Thus, although the doctrine of vacatur is ideologically neutral, in practice it favors those repeat litigants with sufficient resources to buy their way out of adverse decisions.[14]

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[14] For example, the insurance industry has made a regular practice of seeking vacatur of adverse decisions and then arguing that the weight of authority is on its side. *See* Philip Carrizosa, *Making the Law Disappear*, California Lawyer, Sept. 1989, at 65-66 (quoting Ellis J. Horvitz of Horvitz & Levy); *see also Slater v. Lawyers' Mutual Insurance Co.*, 227 Cal. App. 3d 1415, 1427, 278 Cal. Rptr. 479 (1991) (Johnson, J., dissenting) (criticizing this practice and observing that the insurance companies' arguments were deceptive because they had manipulated the weight of authority through their efforts to purge adverse appellate decisions from the case books). *See generally* Jill E. Fisch, *Captive Courts: The Destruction of Judicial Decisions by Agreement of the Parties*, 2 N.Y.U. Envtl. L. J. 191, 204-08 (1993) (describing systematic efforts on the part of repeat players, particularly the insurance industry, to control the development of the law by destroying adverse decisional authority).

Nor does the adversary system protect against this manipulation. As long as the proffered settlement is adequate, a prevailing party will have no reason to defend the judgment. Indeed, a savvy litigant may even be able to *enhance* the terms of the settlement with the knowledge that its adversary is concerned about the collateral consequences of the judgment.[15] Thus, both litigants may gain from vacatur: the losing party by achieving control over the litigation process; and the winning party by enhancing its settlement position. The public and our system of justice lose, and their only guardians are the members of the judiciary.

CONCLUSION

For these reasons, we urge this Court to reject the request for vacatur in this case and adopt a rule that a motion to vacate

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[15] This problem is illustrated by the settlement in *Bankers Trust Co. v. Hartford Accident and Indemnity Co.*, 518 F. Supp. 371, *vacated*, 621 F. Supp. 685 (S.D.N.Y. 1981). After the district court found Hartford liable for pollution cleanup costs, the case was settled and the district court opinion was vacated. Seven years later, it was fortuitously revealed in another case that the terms of the settlement had provided for Hartford to pay Bankers Trust approximately $200,000 *more* than the value of Bankers Trust's claim in exchange for the ability to destroy the adverse district court judgment. *See Intel Corp. v. Hartford Accident and Indemnity Co.*, 692 F. Supp. 1171, 1192 n.32 (N.D. Cal. 1988) (describing terms of settlement agreement in *Bankers Trust*). Under these circumstances, the litigant was able to appropriate a portion of the societal value of the judgment for its private gain.

a decision in a case that is settled pending appeal may be granted *only* in cases where (1) the movant establishes that the previous judgment was defective; or (2) where a litigant is precluded, by happenstance, from obtaining appellate review. Absent a showing that one of these conditions has been met, courts should be directed to deny motions to vacate a case that has been settled pending appeal.

Respectfully submitted,

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